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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ANDREW CZEKAJ and PENNIE PHYLLIS HUDSON, et al.

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

Respondents.

Petition for Writ of Certiorari to the Superior Court of California County of Santa Barbara

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an ordinance which prohibits "all expressive or symbolic conduct, whether active or passive" on the public sidewalk at the driveway or within eight feet of the driveway of any self-selected health care facility or place of worship, an unconstitutional restriction on protected First Amendment activity?

PARTIES

In addition to the parties which appear in the caption of the case, the parties to the proceedings below include petitioners Carol Ichinose, Barbara Haulbosky, Nancy Gillet, Jill Hudson, Howard Pellamounter, Josephine Schumacher, and Dorothy Johnson. None of the petitioners is a corporation.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Court of Appeal denying the transfer of the case (App. 19a), the decision of the Superior Court, Appellate Department, affirming the convictions and reversing the dismissals (App. 1a), and the decision of the Municipal Court (App. 8a) are all unreported. The order denying the petitioners' petition for writ of habeas corpus is also unreported (App. 21a).

JURISDICTION

The Court of Appeal issued its order denying the transfer of the case on February 7, 1995. There is no petition for review to the California Supreme Court from a denial of transfer to a Court of Appeal. California Rule of Court 28(b). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents a facial and as-applied challenge to § 9.99.030 of the Santa Barbara Municipal Code. In May, 1993, Respondent City of Santa Barbara [hereinafter "the City"[1]] enacted an ordinance purporting to prevent harassment and intimidation of persons entering health care facilities and places of worship by creating zones on the public sidewalk in which all "demonstration activity" is prohibited. As noted by the Superior Court appellate panel, the ordinance was enacted as a response to the expressive activity of anti-abortion individuals at one abortion business and at the home and church of one abortion provider.

Specifically, § 9.99.030 provides: "No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, . . ."[2] Section 9.99.010(D) de-

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[1] Although the named Respondent in this action is the People of the State of California, the challenged ordinance was enacted by the City, and violations were prosecuted by the City Attorney. Furthermore, the lower court herein referred to the Respondent as "the City". Therefore, for the sake of clarity and consistency, this petition will refer to the Respondent as "the City".

[2] The full text of § 9.99.030 is as follows:

> No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

fines "demonstration activity" as "All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities."

The ordinance further provides that "at the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area." The City has adopted a policy of enforcing the ordinance only at those locations which have requested the City to delineate the driveway boundaries by painting lines on the curb. To date, only one health care facility (a Planned Parenthood abortion facility) and one church (that attended by Planned Parenthood's medical director) have requested the City to paint lines on the curb.

Petitioners are individuals who oppose abortion as the unjustified killing of innocent children. They seek to communicate that view, as well as offers of material and emotional assistance, to women seeking abortions, and to the parents, friends, and companions of such women.

The principal venue for the petitioners' counseling activities is the sidewalk adjacent to the Planned Parenthood abortion facility in Santa Barbara. There they speak and offer literature to clients and their companions who are entering or leaving the facility, usually in cars.

With the City's enactment of § 9.99.030, the petitioners were presented with the choice of either attempting to communicate to persons entering or leaving the clinic in cars by shouting to them from approximately fifteen feet away, or of violating the law. The City's enforcement of the ordinance

prohibited entering the "demonstration-free zone" *even when patrons stopped in their cars and asked for literature.*

The petitioners were arrested and charged on numerous occasions for violating § 9.99.030. At each trial on these charges, the petitioners argued that § 9.99.030 was unconstitutional, and sought to introduce evidence showing that the ordinance was viewpoint-based in its purpose and in its enforcement,[3] that it was not narrowly tailored to serve any legitimate state interest, and that it did not leave open adequate alternative channels of communication.

Some of the criminal charges resulted in convictions, which carried a sentence of $100.00, plus a penalty assessment of an additional $170.00. In three cases, the charges were dismissed by the trial court, because of evidence showing that the petitioners had entered the zone after a patient or companion had asked to receive literature ("invitation cases").[4] In no case was there any evidence that any of the petitioners had obstructed access to the clinic, intimidated anyone, or otherwise acted unlawfully. At each trial, the City and its

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[3] As will be discussed more fully in Section I(B)(2), *infra*, the petitioners introduced evidence showing that Planned Parenthood agents were never prosecuted for engaging in expressive activity in the zone, while the petitioners were arrested, jailed, and prosecuted for such activity as silently praying or kneeling in the zone.

[4] Specifically, of the arrests and convictions which are the subject of this petition, petitioner Richard Czekaj was convicted of 31 counts of violating § 9.99.030, and one count was dismissed because the court found he had entered the zone on invitation of a patron; petitioner Pennie Hudson was convicted on four counts, and two counts were dismissed on the grounds of invitation; petitioner Carol Ichinose was convicted on five counts; and petitioners Barbara Haulbosky, Nancy Gillet, Jill Hudson, Howard Pellamounter, Josephine Schumacher, and Dorothy Johnson were each convicted on one count.

witnesses conceded that the sole basis for the arrests was the petitioners' engaging in leafletting, counseling, silent prayer, or silent reading of the Bible in the zone.[5]

Petitioners appealed their convictions, again arguing that the ordinance was content- and viewpoint-discriminatory on its face and/or as applied, that it was not narrowly tailored to serve a legitimate governmental interest, and that it did not leave open adequate alternative channels of communication. The City appealed the dismissals of the invitation cases. The appellate department of the superior court, in a brief, five-page opinion which ignored almost all of the petitioners' arguments, affirmed all of the convictions and reversed the order dismissing the charges in the invitation cases.

In rendering its decision, the superior court appellate panel cited only one case, *Madsen v. Women's Heath Center*, 114 S.Ct. 2516 (1994). The court stated, "The interest asserted by the city, in preserving free access to medical clinics and churches, is the same interest the Supreme Court found sufficient in *Madsen*." App. 4a. The court also noted that the ordinance created a smaller zone than that upheld in *Madsen*. The court held that, in passing a valid ordinance,

> "It is sufficient for the legislative authority to find that the proposed enactment addressed a matter of public interest, and meets the tests of being content-neutral and minimally-intrusive in its impact on protected speech. Those tests were held to be met in *Madsen* under the

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[5] Two of the judges who heard these cases specifically stated on the record that the petitioners' conduct was peaceful, and in the words of Judge Huseman, that their conduct was entirely lawful "but for this particular ordinance." These findings are supported by hours of continuous videotape footage taken by Planned Parenthood and introduced as evidence at trial.

more restrictive test established in that case for review of injunctions, and therefore clearly the same provisions meet the less stringent test for legislative enactments under *Madsen*." App. 4a–5a.

After holding the ordinance constitutional under *Madsen*, the court concluded by reversing the order dismissing the cases of invitation, on the grounds that allowing an "invitation defense"[6] could render the ordinance unenforceable, "because such arguments could be raised in almost any case, depending solely on the subjective perceptions of demonstrators inclined to view every ambiguous gesture as such an 'invitation'." App. 6a.

On February 7, 1995, the Court of Appeal for the Second Appellate District denied the transfer of the case for hearing and decision. There is no petition for review to the California Supreme Court from a denial of transfer by the Court of Appeal. California Rule of Court 28(b). Thus, the superior court appellate panel's opinion upholding the convictions and reversing the dismissals was the last and only state appellate review of the constitutionality of § 9.99.030 rendered.

On March 15, 1995, in a separate action filed on behalf of other parties, the federal district court for the Central

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[6] Petitioners had argued, not that there should be an "invitation *defense*," but that the invitation cases undercut the City's asserted governmental interest in passing the ordinance, i.e., the interest in protecting "the rights of persons seeking to use health care facilities or places of worship to be free from direct confrontation, hindrance, harassment, intimidation and harm." The very fact that § 9.99.030 prohibited approaching willing listeners, and in fact, listeners who invited such approach, demonstrated that the ordinance was not narrowly tailored to serve the purported governmental interest.

District of California granted a preliminary injunction prohibiting enforcement of § 9.99.030 and a companion ordinance, § 9.99.020. *Edwards v. City of Santa Barbara*, — F.Supp. —, 1995 WL 235582 (C.D.Cal.). The court found that § 9.99.030 suffered from "gross overbreadth," and that it was not narrowly tailored to serve a significant governmental interest, in that it "criminalizes expressive activity *qua* expressive activity, without relating such activity to its effect on impeding access to the clinic." 1995 WL at *3, n. 6, *10.

On April 12, 1995, petitioners sought relief from their convictions under § 9.99.030 by petition for writ of habeas corpus to the Superior Court. The writ was denied due to the absence of any actual or constructive restraint on the petitioners. App. 22a.

On April 14, 1995, petitioners sought from the City of Santa Barbara an assurance that, should the decision in *Edwards* be upheld at the highest level on appeal, the City would not oppose a motion to dismiss their convictions. The City refused to provide such assurance. Instead, it has taken the position that the disposition in *Edwards* has no effect on the legality of convictions obtained prior to that decision, and that the petitioners must exhaust all appellate remedies, including petition to this Court, or the convictions will become final.

Because the petitioners face liability for thousands of dollars in fines for the exercise of their First Amendment rights, and because they have exhausted all their state court remedies, both direct and collateral, for relief from these convictions and sentences, they timely filed this petition for review on May 8, 1995.

REASONS FOR GRANTING THE WRIT

Petitioners find themselves in the difficult position of having to seek protection for their First Amendment rights from this Court, in a context which should have been dealt with and easily disposed of in a lower court. Unfortunately, the lower state courts evaded their duty to confront and address the serious constitutional issues raised by these cases.

The superior court, although it heard the appeal and rendered a decision, completely failed to address both the legal issues and the detailed factual record from the trial court demonstrating the constitutional infirmity of § 9.99.030 on all criteria. Instead, it provided a cramped rationale for upholding the ordinance: *Madsen* upheld a bigger zone under a more stringent standard, therefore a smaller zone[7] under a less stringent standard must be valid. The logical implication of this reasoning is that, in *Madsen*, the Supreme Court implicitly overruled several other cases in which it has struck down ordinances restricting speech activity in public fora. *See, e.g., United States v. Grace*, 461 U.S. 171 (1983) (striking down ordinance restricting picketing on public sidewalks adjacent to Supreme Court grounds); *Thornhill v. Alabama*, 310 U.S. 88 (1939) (striking down ordinance prohibiting picketing businesses).

Equally erroneous was the superior court's upholding of the ordinance on the grounds that "the present state of authority is that no decision of the United States Supreme Court has invalidated an ordinance of the kind presented here on the grounds urged by defendants." App. 5a. Under

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[7] Even in this oversimplification of the issues, the court erred in describing the zone as being "16 feet in total width." The zone consists of the "driveway area" *and* eight feet on either side, resulting in zones of various widths, depending on the width of the driveway in question.

this reasoning, rather than giving the benefit of any presumption to free speech rights,[8] a challenge to an ordinance restricting speech activity will succeed only if the defendant can show that the same or similar ordinance has already been struck down by this Court. Lower courts thus abdicate their responsibility to assess the constitutionality of particular restrictions using the principles enunciated by this Court, and instead will routinely uphold such ordinances while waiting for this Court to rule on each and every particular type of restriction a legislative body might decide to enact.[9]

I. THE DECISION OF THE LOWER COURT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

A proper review of § 9.99.030 would have assessed its validity against this Court's well-established tests for restrictions on speech in public fora. This review would have revealed that § 9.99.030 runs afoul of many of the decisions of this Court regarding such restrictions.

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[8] Cf. *United States v. Grace*, 461 U.S. 171, 180 (1983) ("the destruction of public forum status [of public sidewalks] is at least presumptively impermissible"); *Frisby v. Schultz*, 487 U.S. 474, 480–1 (1988) (public sidewalks are traditional public fora, which for " 'time out of mind' . . . have been used for public assembly and debate. . . . No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora").

[9] The refusal of the Court of Appeal to accept the transfer of this case for further appellate consideration indicates that the court adopted the superior court's flawed perspective on the duty of reviewing courts in assessing the constitutional validity of legislative enactments. Otherwise, the court's refusal to accept a case of first impression, involving unprecedented restrictions on protected speech activity in a public forum, is inexplicable.

A. *Board of Airport Commissioners v. Jews for Jesus*

Virtually the only Supreme Court case dealing with a ban on speech as all-encompassing as that imposed by § 9.99.030 is *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). In that case, the Board of Commissioners imposed a ban on all "First Amendment activities" in the Los Angeles International Airport. This Court ruled that the ban on "the universe of expressive activity" was facially unconstitutional under the First Amendment overbreadth doctrine "because *no conceivable governmental interest* would justify such an *absolute prohibition* of speech." *Id.* at 574–5 (emphasis added). In light of the substantial overbreadth of this total ban, the Court even found it unnecessary to decide whether the Airport was a public forum or not.[10]

The Court emphasized that the blanket prohibition on all expressive activity "confers on police a virtually unrestrained power to arrest and charge persons with a violation. . . . The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Id.* at

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[10] See also *Gerritsen v. Los Angeles*, 994 F.2d 570 (9th Cir. 1993) *cert. denied*, 114 S.Ct. 306. In that case, the city passed an ordinance banning literature distribution in certain "blue line" areas of a public park. The Court, in striking down the ordinance, noted that "[w]hile the ban is narrow in its reach, in that it affects only these specific areas, courts rarely have upheld complete bans on a category of First Amendment expression." The court held that the ban was unjustified: "To the extent that City officials sought to curtail unprotected activity in the blue-line areas . . . the *total* ban on literature distribution was substantially broader than necessary." 994 F.2d at 577 (original emphasis).

In the instant case, § 9.99.030 imposes not simply a complete ban on one category of First Amendment expression, but a complete ban on *all* categories of expressive activity.

576, quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135–6 (1974) (Powell, J., concurring).

In the instant case, petitioners introduced evidence demonstrating that § 9.99.030 presented not only the opportunity but the occasion for abuse through the interpretations of the police and the city attorney. These interpretations resulted in enforcement of the ordinance only against persons present to oppose abortion, and not against persons in the zone acting as "escorts" for the clinic. *See* Section (I)(B)(2), *infra.*

The Court in *Jews for Jesus* also noted that the ban reached far beyond the leafletting activities of the respondents in that case. Rather, "it prohibits even talking or reading, or the wearing of campaign buttons or symbolic clothing. . . . Under such a sweeping ban, *virtually every individual* who enters LAX may be found to violate the resolution by engaging in some 'First Amendment activity.'" *Id.* at 575 (emphasis added).

Similarly, § 9.99.030 establishes a ban on the "universe of expressive activity" in certain segments of public fora. Just as with the airport regulation, the City could arrest virtually every individual who walked down the sidewalk in front of a health care facility or church, talking with a friend, reading a newspaper or billboard, whistling, pointing, grimacing, or wearing clothing with writing or pictures. Any client who responded by words or gestures to either the petitioners or the "escorts" while in the zone would also be subject to arrest.

Clearly, there is no legitimate governmental interest which justifies this absolute prohibition on speech in front of a health care facility and a church.

B. *Perry Education Assn. v. Perry Local Educators' Assn.*

Governmental bodies may regulate the time, place and manner of speech in traditional public fora, but only if such regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). A content-based exclusion may only be enforced if it serves a compelling government interest and is narrowly tailored to achieve that end. *Id.*

1. Narrowly tailored to serve a significant governmental interest

The governmental interest which § 9.99.030 initially purported to serve is set forth in the preface, which states that the ordinance is necessary to protect "the rights of persons seeking to use health care facilities or places of worship to be free from direct confrontation, hindrance, harassment, intimidation, and harm." Specifically, the preface states that "persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity . . . by persons approaching within extremely close proximity and shouting or waving objects at them." This activity "creates a captive audience situation" and "may pose health risks," all to the detriment of "a person's right to privacy" and "right to seek preservation of personal health and legitimate medical treatment."

It is this interest to which the superior court apparently was referring where it stated that the ordinance "merely creates a narrow corridor of 8 feet . . . so that patients and worshippers may enter without being physically confronted by unwelcome demonstrators." App. 3a.

However, rather than enacting an ordinance narrowly tailored to serve this stated interest, the City, in § 9.99.030, completely banned all speech activity from the public sidewalks adjacent to the driveways of health care facilities and places of worship. The City made no attempt to focus the ordinance only on those activities which cause the type of disruption the ordinance purports to address. *Cf. Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ordinance prohibiting "making any noise or diversion which disturbs or tends to disturb the peace or good order of such school session"; ordinance was narrowly tailored because it punished "only conduct which disrupts or is about to disrupt normal school activities"). Rather, the ordinance "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or the press." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (striking down ordinance which prohibited picketing for the purpose of "hindering, delaying or interfering with or injuring" a business).

Moreover, this asserted interest in protecting persons from "physical confrontation" is itself constitutionally suspect. Many traditional forms of protected speech involve "direct" or "physical confrontation" with speakers who may or may not be welcome. *E.g., Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("the most effective, fundamental and perhaps economical avenue of political discourse [is] direct one-on-one communication"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (accosting strangers and challenging their religious beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (stationing "store watchers" outside boycotted businesses); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing outside business); *Lovell v. Griffin* 303 U.S. 444 (1938) (leafletting).

The second governmental interest cited by the superior court is that of "preserving free access to medical clinics and churches."[11] App. 4a. While the preamble to the ordinance expresses concern with "access" to these facilities, the purported threat to access arose from "harassment," "intimidation," etc., not from physical obstruction of ingress. Moreover, the City did not assert this interest of "preserving free access" in its briefs filed before *Madsen* was decided; instead, the City argued that the ordinance served the interests in "protecting privacy" and ensuring traffic safety.[12]

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[11] Though the superior court stated that this interest "is the same interest the Supreme Court found sufficient in *Madsen*," App. 4a, neither the trial court, nor the superior court, nor the City has ever cited any authority for the existence of a significant governmental interest in preserving access to churches, or otherwise affording special protection to churchgoers. As the petitioners argued in introducing the legislative history of § 9.99.030 into evidence at trial, the inclusion of churches establishes the viewpoint-based motivation underlying the ordinance. "Places of worship" were included as an afterthought, because "churches have been targeted for picketing and demonstrating against abortions because church-goers include physicians who perform abortions." Defendants' Reply Brief, Appendix C.

[12] Though the City alluded to this traffic safety interest in earlier trials, it was not until the fifth trial that the City produced its traffic engineer to testify. Not surprisingly, he testified that, from a traffic safety standpoint, it is not desirable to have cars stop in driveways to accept literature. On cross-examination, however, he testified that he was never consulted before the ordinance was passed, though he normally would be consulted about any ordinance dealing with traffic and traffic safety. Further, he was not aware of any reports of traffic problems at the Planned Parenthood clinic prior to the passage of § 9.99.030. Needless to say, he did not testify as to any particular conditions at health care facilities and churches which would indicate that a demonstration-free zone was especially appropriate at such locations, as opposed to any other driveway location open to the public in the City.

In any case, § 9.99.030 is not narrowly tailored to serve the governmental interest in preserving access to health care facilities and places of worship. First, the City apparently was not concerned about any other impediment to access than that occasioned by "demonstration activity"—*any* demonstration activity. The ordinance does not distinguish between marching six abreast down the sidewalk carrying banners and signs—activity that conceivably could pose a threat to access—and standing in the zone wearing a T-shirt or button that says "Adoption Not Abortion." If the ordinance is intended to ensure access, why does it allow unlimited non-expressive pedestrian traffic in front of clinics? Why does it not prohibit all stopping or standing in the access areas to clinics and places of worship?[13] Such activities are no more or less likely to impede access than standing with a sign or a Bible or a leaflet.

Second, the application of the ordinance is limited, by the City's enforcement policy, to those health care facilities and churches which request that their curbs be marked for enforcement of the zone. Thus, rather than generally serving the purported government interest in preserving access to health care facilities and churches, the ordinance delegates to private entities the authority to restrict speech, a power which they may exercise for any reason that suits their purpose, with or without regard to preserving access.

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[13] Cf. *Madsen*, in which, in order to preserve access to the clinic, this Court upheld an injunction prohibiting not just expressive activity, but even merely "entering" the buffer zone.

2. Content-neutral

(a) Section 9.99.030 is content- and viewpoint-based in its purpose.

Closely intertwined with the question of whether the ordinance is narrowly tailored to serve a significant governmental interest is the question of whether the City, in enacting § 9.99.030, was seeking to further an interest which is not legitimate, and which, in fact, is content- and viewpoint-discriminatory.[14]

As noted in the previous section, the purported purpose of the ordinance is set out in the preamble. Specifically, the preamble states that "reasonable time, place and manner restrictions" are required "to *separate* and protect persons expressing their views and persons wishing to access health care facilities . . . without direct confrontation, hindrance, harassment, or intimidation." (Emphasis added). This view of the purpose of the ordinance was echoed by the superior court where it stated that § 9.99.030 "merely creates a narrow corridor of 8 feet . . . so that patients and worshippers may enter without being physically confronted by unwelcome demonstrators." App. 3a.

As noted in the previous section, this formulation itself poses constitutional difficulties. These are accentuated by the statements of the City's representatives as to the purpose

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[14] Throughout this litigation, the City has asserted a variety of interests underlying § 9.99.030. These interests have either been so narrow that the ordinance is obviously overly broad to serve the interest, (e.g., preventing harassment and intimidation of persons entering health care facilities and churches) or so broad that the ordinance is too underinclusive to serve that interest (e.g., to protect the free flow of traffic on streets and ensure traffic safety).

of the ordinance. For example, in the first trial on charges arising from the petitioners' violation of § 9.99.030, the City Attorney, in closing argument, stated:

> Harassment is part of what the ordinance seeks to address. However, the privacy rights of the individuals to be able to go into their doctor's office or to see their clergy person without having information and ideas which are contrary to their purpose, these are intelligent, free people who have chosen to go to these places. And these are private matters. Going to one's doctor is a private matter. And the government is attempting to recognize and protect that privacy. [Transcript of trial, September 17, 1993, p. 437]

This statement indicates two other purposes behind § 9.99.030: 1) protecting "intelligent, free people" from encountering information and ideas "contrary to their purpose" and 2) protecting the "privacy" of people visiting their doctor or clergy person.

As to the first purpose, protecting adults from information and ideas is not a significant state interest; it is not even a legitimate state interest. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is not a legitimate state interest to ensure that "intelligent, free people" are protected from certain information and ideas.

A regulation of speech is content-neutral only if it is "justified without reference to the content of the regulated speech." *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The superior court ad-

dressed the issue of content-neutrality only obliquely, noting that this Court in *Madsen* found the injunction content-neutral "because it did not depend for enforcement on the content of speech, and held that the fact that enforcement had been only against one group was the result, not of state discrimination, but of the choices of the demonstrators." App. 3–4a. As the above quotation from the City Attorney establishes, the City's justification for § 9.99.030 does indeed look to the content of speech, in that it seeks to protect persons from speech "contrary to their purpose" in going to their doctor.[15] Moreover, that interest has as its major premise the assumption that expressive activity outside health care facilities and churches will be unwelcome and "contrary to the purpose" of people entering and leaving.

Aside from the issue of whether the stated interest underlying the ordinance was content-neutral, petitioners sought to introduce evidence showing that § 9.99.030 was effectively a "private bill" for the benefit of Planned Parenthood. The trial court erroneously excluded petitioners' proffered evidence concerning the legislative history of the ordinance, as well as the involvement of Planned Parenthood and its

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[15] The second interest invoked by the City Attorney, i.e., protecting privacy, was not cited by the superior court. The City appears to have misconstrued the scope of the right to privacy. The right to privacy has been held to protect information which a person does not want disseminated to others, and the right to make and effectuate certain decisions regarding personal autonomy, such as the decision to obtain an abortion. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992); *White v. Davis*, 13 Cal.3d 757 (1975) (construing state constitutional right to privacy); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252 (1981) (same). It does not protect, in some unspecified way, the right of people to visit their doctor or clergy person without being approached and spoken to.

lawyer in drafting it so that it was geographically tailored for the Planned Parenthood site, and working with the City Attorney to ensure that it was interpreted so as to protect Planned Parenthood employees from arrest. Though the petitioners raised this issue on appeal, the superior court failed to address it at all in its opinion.

(b) Section 9.99.030 has been enforced in a viewpoint-discriminatory fashion against the petitioners.

In the first weeks after § 9.99.030 was enacted, during the time the first arrests of the petitioners were taking place, Planned Parenthood employees routinely went into the demonstration-free zone to speak to patients, to interrupt conversations between patients and the petitioners, and to distribute written information to patients. Despite the fact that these violations were pointed out to police and the City Attorney, the Planned Parenthood employees were virtually never arrested, and the very few arrests never resulted in prosecution.

Various explanations were provided for this one-sided enforcement of the ordinance. Witnesses who were employees of Planned Parenthood testified that the City Attorney had informed Planned Parenthood's legal counsel that Planned Parenthood agents were permitted to enter the zone for the purpose of informing clients that they were with Planned Parenthood, to offer to walk with them, to instruct them (the clients) to keep driving into the clinic parking lot, and to tell them they don't have to talk to the demonstrators. According to the City Attorney's interpretation of § 9.99.030, none of this conduct constituted "demonstration activity." Clinic employees were also permitted in the zone wearing vests which said "ESCORT." This was interpreted as "identification," not demonstration.

A second explanation was a distinction which the City Attorney read into the ordinance between public and private property. Although the ordinance contains no exception for private property, the City Attorney saw no violation of § 9.99.030 where Planned Parenthood agents stationed themselves on Planned Parenthood's property, immediately adjacent to the public sidewalk, exactly in the path of incoming vehicles. From that vantage point, they also are allowed to engage in unlimited "expressive activity" with impunity.

A third explanation for the City Attorney's failure to arrest and prosecute Planned Parenthood agents was that the evidence was unclear as to the *content* of the communication between the agent and the client. For example, petitioner Czekaj put into evidence a letter from the City Attorney stating that she had dismissed the case against a Planned Parenthood agent who was in the zone, wearing a vest which said "ESCORT", speaking to a client. The reason was that, because the agent was speaking Spanish, Mr. Czekaj did not know what she was saying, and therefore there was insufficient evidence that this was "demonstration activity."[16]

Finally, in some instances, such as Planned Parenthood agents handing out leaflets to patients in the zone, the City

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[16] During this same time period, petitioner Dorothy Johnson had been arrested and later prosecuted for kneeling silently on the sidewalk while apparently praying. Petitioner Czekaj was arrested after he merely turned toward a car, without saying anything or handing out any literature; the arresting officer considered this "demonstration activity" because Mr. Czekaj had been arrested three times prior to that date.

For the first few months after the enactment of § 9.99.030, the police jailed the petitioners after each arrest, for periods up to five days, although the City Attorney routinely charged the violations as infractions, which do not carry any jail time. Petitioner Czekaj testified that he had spent in excess of 30 days in jail after such arrests.

Attorney simply ignored the petitioners' requests that the ordinance be enforced even-handedly.

The petitioners highlighted all of this evidence in their appeal to the superior court, including in their appellate briefs extensive citations to the trial court record. However, in its decision the superior court did not even acknowledge that the issue of the City's viewpoint-based application of the ordinance existed.

3. Ample alternative channels of communication

The superior court did not address, even in a cursory fashion, the question of whether § 9.99.030 leaves open ample alternative channels of communication. Only in reversing the dismissals in the invitation cases did the court note that "any patron who wishes to engage in further contact has the minimal burden of leaving a zone extending only 8 feet around the driveway." App. 6a.

This statement, of course, addresses only the burden on a willing listener, not on the petitioners attempting to communicate with their target audience. Even on those terms, however, the court's conclusion is erroneous. For those leaving the facility in cars, the burden of reaching the speakers becomes quite daunting, involving pulling out and then parking on a street which the City consistently described as being very busy.[17] Moreover, there is no basis on which to assume that parking will be readily available. As a practical matter, therefore, patrons wishing to receive information are

[17] Another alternative would be to leave the car standing in the driveway while the driver or passenger gets out to approach and speak to those outside the zone and receive information. Obviously, this poses a much more significant threat to access than if the speakers were allowed to enter the zone to hand the information to the occupants of the car.

likely to be frequently discouraged from doing so by these difficulties, rather than finding it a "minimal burden."

More importantly, however, "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). The fact that the petitioners "remain free to employ other means to disseminate their views does not take their speech . . . outside the bounds of First Amendment protection. . . . The First Amendment protects [the] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Leaving aside the question of whether communication with willing recipients is a practical possibility, § 9.99.030 also precludes effective communication with a large portion of the petitioners' intended audience, i.e., those who are undecided.

This Court has held that the ability to reach persons "not deliberately seeking . . . information" and the effectiveness of the mode of communication are both significant factors in determining the presence of ample alternatives. *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977). As noted above, even a willing listener is likely to encounter difficulties in receiving information from the petitioners. All the more so, uncommitted listeners are unlikely to undertake the task of obtaining literature, which, in the absence of the ordinance, they would be able to receive simply by putting out their hand.

Placing the burden on willing and uncommitted listeners to seek out information is not an adequate alternative channel of communication.

C. *Madsen v. Women's Health Center*

As noted above, the superior court based its ruling entirely on a very simplistic approach to *Madsen*. Because this Court upheld a larger zone under a more stringent standard, the court reasoned, the smaller zone created by § 9.99.030 must be constitutionally valid. This formulaic conclusion ignored several important distinctions which the petitioners pointed out in their briefs.

1. Madsen *upheld an injunctive order, which applied to defendants who had interfered with access, rather than the general public.*

Although in *Madsen* this Court stated that its test for injunctive relief was "somewhat more stringent" than that for a statute or ordinance, that comparison must be understood in the context in which each situation arises. In an injunction case, the threat to the asserted governmental interests has been established through litigation, in which those who will be restrained have had the opportunity to defend themselves. Only when a court finds that certain individuals pose a concrete danger to certain interests will an injunction issue, and then only against those parties. Thus, while the injunction must "burden no more speech than necessary to accomplish a governmental interest," the level of necessity to protect those interests, specifically from the acts of the party-defendants, has already been established:

> "An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, *because of the group's past actions* in the context of a specific dispute between real parties. . . . Here, the state court imposed restrictions on petitioners

incidental to their anti-abortion message because they repeatedly violated the court's original order." *Madsen*, *supra*, at 2523-4 (emphasis added).

In contrast, an ordinance such as § 9.99.030 binds everyone, regardless of whether any particular individual has ever posed a threat to any governmental interest. It is far more difficult for a government entity to establish that restraining the general public is necessary to promote a particular governmental interest, than it is to show that restraining certain individuals, with a proven record of past acts, is necessary. Consequently, permissible restraints on the speech of the general public will be far narrower in scope than those imposed on individuals through injunctive relief.

2. The decision in Madsen *was based on the assumption that the petitioners' demonstration activity actually impeded access to the clinic.*

The record presented to this Court in *Madsen* did not include the factual record of the proceedings in the trial court, and the petitioners specifically conceded, *arguendo*, that there was a sufficient factual basis for the injunction. Thus, the petitioners allowed, and the Court based its decision on "the assumption that . . . the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic . . ." 114 S.Ct. at 2528.

The petitioners herein made no such concession. On the contrary, the record in these cases amply demonstrates that the petitioners' speech activity in the zone did *not* interfere with ingress and egress, nor did it interfere with through traffic on the street. Time after time, in incident after incident, the petitioners were arrested after engaging in expressive ac-

tivity in the zone, during which times, as the complaining witnesses all admitted, there was no interference with access to the clinic, nor were there traffic problems.

Because the record showed that expressive activity in the zone does *not* cause interference with ingress and egress, the principles enunciated in *Madsen* dictate that the ordinance is unconstitutionally overbroad.

3. The buffer zone in Madsen *was upheld because lesser restrictions had not protected access to the clinic.*

In *Madsen*, this Court went to great lengths to emphasize that the constitutionality of the buffer zone was contingent on the failure of lesser restrictions to accomplish the asserted governmental interests. Specifically, the trial court's earlier order had merely prohibited blocking access to the clinic, without imposing any zone. Only when, because of repeated violations by the petitioners, that order proved insufficient to protect access, did the court issue its broader order excluding petitioners from the buffer zone.

By contrast, there is nothing in the legislative history of this ordinance to indicate that the City took steps to enforce any other laws before voting to infringe on First Amendment rights. There are several penal statutes which prohibit the behavior which allegedly necessitated the enactment of § 9.99.030. There are laws against blocking access on public ways (Pen.C. § 647(c)) and disturbing the peace (Pen.C. § 415). There is even a law specifically prohibiting obstructing access to health care facilities, churches, and schools. Pen.C. § 602.11. As a federal court noted in *Thomason v. Jernigan*, 770 F.Supp. 1195 (E.D.Mich. 1991), "[W]hile vacating [the public easement] might be a 'valuable law enforcement tool,' the City is required to show that it at least

opened its tool box before it can abridge First Amendment rights for the purpose of adding another tool to an already-full box."

The virtual absence in our country of blanket bans on expressive activity, such as that imposed by § 9.99.030, undoubtedly reflects the fact that the traditional modes of maintaining public order have generally been found sufficient to deal with problems arising from speech activity in public fora. *Madsen* and other injunction cases do present a different situation from a legislative enactment, as was discussed *infra*, Section C(1). This difference explains why this Court has upheld the imposition of a speech-free zone only pursuant to an injunction, never as a legislative time, place, manner restriction.

II. THE DECISION OF THE LOWER COURT CONFLICTS WITH THE FEDERAL COURT DECISION IN *EDWARDS V. CITY OF SANTA BARBARA*.

As discussed earlier, parties other than the petitioners herein brought an action challenging the constitutionality of § 9.99.030. The action was filed in federal district court in March, 1994. In October, 1994, the City moved for summary judgment, and the plaintiffs moved for a preliminary injunction.

In granting the plaintiffs' motion for a preliminary injunction enjoining enforcement of § 9.99.030, the federal district court ruled that the ordinance was "distinctly overbroad." *Edwards v. City of Santa Barbara*, 1995 WL 235582, *11.[18]

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[18] The plaintiffs in *Edwards* also challenged the ordinance as content- and viewpoint-discriminatory, on several different theories. Some of these the court declined to decide because of its conclusion that the

Noting the all-encompassing definition of "demonstration activity" in the ordinance, the court held that "such a blanket ban necessarily prohibits more expressive conduct than is necessary to achieve the purpose of the ordinance." *Id.* at *10. Quoting *Board of Commissioners v. Jews for Jesus*, *supra*, the court found that the ordinance "'prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing' within eight feet of every driveway leading up to every medical facility and place of worship in Santa Barbara." *Id.*, quoting *Jews for Jesus*, 482 U.S. at 574. The court further noted that the ordinance "prevents traditionally favored activities such as leafletting and handbilling." *Id.*

In sum, the court held that § 9.99.030:

> "criminalizes expressive activity *qua* expressive activity, without relating such expression to its effect on impeding access to the clinic. Such a sweeping ban on protected First Amendment activity cannot withstand constitutional scrutiny. It is simply not narrowly tailored to achieve its averred purpose, the protection of ingress to and egress from clinics and churches." *Id.*

The decision in *Edwards* clearly conflicts with the "smaller-zone-lower-standard-constitutionally-valid" conclusion reached by the lower court here. Just as in *Madsen*, there is now a direct conflict between a state court of last resort and the federal court over the constitutionality of the same restric-

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ordinance was fatally overbroad. The court also rejected some of the plaintiffs' theories on other grounds, but, as is clear from the opinion, the plaintiffs' arguments differed from those presented by the petitioners herein, and were not supported by the full factual record of discriminatory enforcement found in the trial court proceedings below.

tion on speech. This Court should grant certiorari to resolve this conflict, or vacate and remand the decision to the lower court for further consideration in light of the decision in *Edwards*.[19]

CONCLUSION

Before coming to this Court, the petitioners exhausted all other avenues for relief from these convictions, from direct appeal, to collateral attack, to stipulation with the respondent City. All of these failed.

Petitioners respectfully request this Court to grant their petition for writ of certiorari, either for plenary review or summary reversal, or to vacate and remand to the lower court for further consideration in light of the decision in *Edwards v. City of Santa Barbara.*

Respectfully submitted,

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[19] Although California state courts are not required to follow the decisions of lower federal courts on constitutional issues, such decisions are considered persuasive and entitled to great weight. *People v. Bradley*, 1 Cal.3d 80, 86 (1969). Because the City has filed a notice of appeal in the *Edwards* case, the lower court here may simply stay further consideration until that appeal, and any further appeal, is resolved. In fact, the appeals in a number of later criminal cases arising under §9.99.030, which were pending at the time *Edwards* was decided, have been so stayed. Petitioners herein should not be required to pay thousands of dollars in fines for the exercise of free speech rights, simply because of the timing of the lower court decision.

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May 8, 1995

APPENDICES

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

RICHARD ANDREW CZEKAJ and PENNIE PHYLLIS HUDSON, et al.,
Defendants and Appellants.

(Santa Barbara Municipal Court)
(Nos. 199477, 200003, 200132, and 201578)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

vs.

RICHARD ANDREW CZEKAJ and PENNIE PHYLLIS HUDSON,
Defendants and Respondents.

(Santa Barbara Municipal Court)
(Nos. 202642, 202643)

DECISIONS ON APPEALS
[Filed January 6, 1995]

BY THE COURT:

The People (by the City Attorney of Santa Barbara) appeal in cases 202642 and 202643 from three orders terminating three charges against defendants Hudson and Czekaj under the "bubble ordinance" adopted by the city to provide a demonstration-free zone of 8 feet around the entrances to medical clinics and churches. [Santa Barbara Municipal Code chapter 9.99.] Defendants Czekaj and Hudson appeal from convictions of violations of these ordinances, after trial, in case nos. 199477, 200003, 200132, and 201578. We consider the two groups of cases separately, but render one decision covering all cases in the interest of clarity and efficiency.

Defendants' appeals after conviction:

Defendants appealed after convictions in numerous municipal court proceedings on charges of violating Municipal Code chapter 9.99, the so-called "bubble ordinance" which was adopted after a long history of confrontations and disputes arising out of anti-abortion protests at Planned Parenthood's medical clinic, and at the home and church of Dr. Bradley, the physician in charge of the clinic. The ordinance forbids any demonstration activity, broadly defined, within 8 feet of any person entering or leaving any health facility, clinic, church, etc. or within an 8 foot zone around the driveways and entrances of such places. The parties refer to this zone as the "bubble" or the "demonstration-free zone".

On appeal, defendants contend that the ordinance is unconstitutional for violation of the First Amendment to the federal constitution.

The key case is *Madsen v. Women's Health Center* (1994) 512 US ___, 114 S.Ct. 2516, 129 L.Ed.2d 593. *Madsen* considered an injunction against demonstrators which was much broader than the bubble ordinance here. That injunction provided for a restricted zone of 36 feet around all property boundaries of the clinic, forbade any images or sound amplification perceptible to clinic patrons during business hours, and prohibited any approach to within 300 feet of any patron. By contrast, this ordinance merely creates a narrow corridor of 8 feet around the driveway and walkway entrances to clinics and churches, so that patients and worshippers may enter without being physically confronted by unwelcome demonstrators. The expansive provisions of the *Madsen* injunction are entirely absent.

The Supreme Court in *Madsen* ruled that the 36-foot buffer zone around the entrances to the clinic was constitutional. The court invalidated the zone around parts of the clinic where there were no entrances, as being no longer "narrowly tailored" to serve the interest in free access to the clinics. The expansive provisions creating 300-foot exclusion zones, prohibiting images visible by patrons, etc. were, not surprisingly, found to be overbroad and thus invalid under the First Amendment, as going far beyond what was necessary to preserve access to the clinic. [129 L.Ed.2d 599–602.]

The high court specifically found that the injunction provision preventing entry by demonstrators into a zone 36 feet wide around the entryways was constitutional. The court noted that the restriction on speech qualified as content-neutral because it did not depend for enforcement on the content of speech, and held that the fact that enforcement had been only against one group was the result, not of state

discrimination, but of the choices of the demonstrators. The court noted that the 36-foot zone permitted demonstrators to approach within 10–12 feet of clinic patrons entering the clinic (because the 36-foot measurement was the total width of the zone, compared to a zone here 16 feet in total width), and held that this was sufficient "access" to deliver the message without violating the constitution.

All these arguments serve to validate the ordinance at bar. The interest asserted by the city, in preserving free access to medical clinics and churches, is the same interest the Supreme Court found sufficient in *Madsen*. Defendants argue that the presence of a history of illegal acts by demonstrators in *Madsen*, and the absence of such a history here, is constitutionally significant; but in reality it just reflects the difference between an injunction and an enactment: to obtain an injunction, a party normally has to show a course of conduct which threatens continuing invasion of a legally-protected interest, whereas to obtain an enactment the proponents must convince the legislative authority that a public problem exists which deserves the proposed remedy, but need not show any previous pattern of "illegal" acts. Indeed, frequently it is passage of the desired enactment which renders certain acts illegal for the first time. Such was the case here. The two processes create somewhat different records, but neither in *Madsen* nor in any other cited authority has the Supreme Court held that a legislature must affirmatively find a history of illegal acts before adopting a constitutionally-valid restriction under the "time, place and manner" doctrine. In fact, such a requirement would be absurd, because it would prevent a legislature from outlawing any activity which was not already outlawed before the enactment. It is sufficient for the legislative authority to find that the proposed enactment

addresses a matter of public interest, and meets the tests of being content-neutral and minimally intrusive in its impact on protected speech. Those tests were held to be met in *Madsen* under the more restrictive test established in that case for review of injunctions, and therefore clearly the same provisions meet the less stringent test for legislative enactments under *Madsen*.

The other authorities cited by defendants are not persuasive, and are at most informational rather than binding authority, being from lower federal courts in other geographical areas. Whether the reasoning of some of those cases is sound or not is for the United States Supreme Court to determine; the present state of authority is that no decision of the United States Supreme Court has invalidated an ordinance of the kind presented here on the grounds urged by defendants. It is that authority which is binding on this court. No California case authority is to the contrary. Accordingly, defendants' convictions for violations of the ordinance do not offend the First Amendment, or the corresponding guarantees of free speech and expression in the California Constitution.

City's appeals from orders dismissing charges:

At trial, defendants introduced evidence tending to show that in the instances reflected in the three dismissed charges, persons inside the protected zone had invited defendants into the zone to present literature or engage in conversation. The court found that under the ordinance, such invitation would not be a defense to a charge of violation. The court then concluded that the lack of such a "defense of invitation" rendered the ordinance "unconstitutional as applied" under the First Amendment. The court overruled a challenge that the ordinance was void on its face under the First Amend-

ment, because the ordinance was content-neutral, limited in scope, carefully balanced the competing interests of the parties, and was a valid "time, place and manner" restriction on speech. The court dismissed the three charges in which evidence of "invitation" was presented, resting the order on constitutional grounds. The city appealed from the orders of dismissal.

It is important to note that the trial judge made these rulings as a matter of first impression, before *Madsen* was published. While this court concludes otherwise, and reverses those dismissals for the reasons stated herein, we observe that the trial court's opinion was thoughtful and well-reasoned, and represented a careful attempt to balance the interests of all the parties. The trial court did find the ordinance valid on its face, for reasons somewhat congruent with our findings above, given that *Madsen* was not yet decided.

Defendants argue on appeal that some form of the "invitation defense" is constitutionally compelled, and that otherwise the ordinance would be invalid. However, the reason for the absence of an "invitation defense" could well be that the city determined that if arguments over whether defendants reasonably interpreted certain gestures by clinic patrons to be "invitations" to come into the demonstration-free zone were to be a legal defense to violation, then the ordinance would become essentially unenforceable, because such arguments could be raised in almost any case, depending solely on the subjective perceptions of demonstrators inclined to view every ambiguous gesture as such an "invitation". Also, the absence of an "invitation defense" presents no significant burden on protected speech, because any patron who wishes to engage in further contact has the minimal burden of leaving a zone extending only 8 feet around the driveway.

The argument that the constitution compels recognition of an "invitation" defense goes far beyond *Madsen*, and is not required by present binding authority. It also raises the problem that the enforcement of the ordinance would then be in the control of persons within the protected zone, rather than applying to all persons equally. The City argues that creation of an "invitation defense" would erode the content-neutrality of the ordinance, and thereby expose it to a claim of First Amendment violation on that ground. While this is a serious issue, decision upon it is unnecessary to resolution of these appeals. We find the ordinance valid both on its face and as applied, without any "invitation defense" being provided. We leave for another day the resolution of the difficult constitutional questions that would be presented by an ordinance containing an explicit "invitation defense" as part of its express language.

Dispositions and Orders

In all those municipal court cases on appeal here, in which defendants appeal from judgments of conviction, the convictions are affirmed.

In the two cases in which the City appeals from the orders dismissing charges on constitutional grounds, the orders of dismissal are reversed, and the matters are remanded to the Municipal Court for further proceedings consistent with this decision.

/s/ James M. Slater, Presiding Judge

WE CONCUR:

/s/ William L. Gordon, Judge
/s/ Richard St. John, Judge

APPENDIX B

IN THE MUNICIPAL COURT, SANTA BARBARA JUDICIAL DISTRICT COUNTY OF SANTA BARBARA, STATE OF CALIFORNIA

MEMORANDUM OF DECISION
Nos. 203095 T, 111266 T

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff

vs.

RICHARD ANDREW CZEKAJ, PENNIE PHYLLIS HUDSON
Defendants

STATEMENT OF FACTS AND PROCEDURE

These cases are consolidated prosecutions of defendants Richard Andrew Czekaj and Pennie Phyllis Hudson for violations of § 9.99.030 of the Municipal Code (hereafter M.C.). It is also known as the "Bubble Ordinance". The section at issue states:

> "No person shall conduct any demonstration activity within the driveway area or within (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person

> to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

Other sections detail the types of activities that are deemed to fall within the purview of "demonstration activities". M.C. § 9.99.010 A. states:

> "DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counselling activities."

These matters were consolidated by stipulation for trial and were taken under submission for the defense to file formal written arguments which were due by April 1, 1994.

The facts presented establish beyond a reasonable doubt that Mr. Czekaj was present in the so called "bubble" or "demonstration free zone" either contacting persons entering Planned Parenthood at 518 Garden Street and distributing literature or conversing with those persons without invitation or consent. On three different occasions however, it appears that the defendants Czekaj and Hudson entered the so-called bubble at the behest of either patients or others entering and/or leaving the premises. The defendants then gave these various persons literature or talked to them.

Defendants attack the facial validity of the ordinance generally. Additionally in the case of both of Ms. Hudson's alleged violations, and one alleged violation (at about the date

of January 14, 1994) involving Mr. Czekaj, the defense alleges that the consensual contact indicated in the facts on these three instances involve an invalid application of the law based upon the facts. In the alternative, the argument by the defense is that there was no violation of the rights or privileges of that class of persons the ordinance was directed to protect. Therefore, there was no breach of law. Or in the alternative these prosecutions are unconstitutional.

The Law

Taking the last defense allegation first, the fact that an alleged victim consents to the entry into the "bubble" and the distribution of the material or exchange of view points, cannot constitute a defense to the charges. "Although the effect of a crime may be harm to an individual victim, the offense is against the state. Hence it is an established principle that ordinarily the injured party cannot prevent criminal prosecution of the wrongdoer for a public wrong by condonation, ratification or compromise." Witkin & Epstein *California Criminal Law* (2d edit.) "Defenses" § 387, p. 447.

It appears clear to the court that the ordinance is a police power directive to protect a specific group of people who wish to exercise constitutional rights. That group of people are those who seek access to a place of worship or health care facility (see M.C. § 9.99.010 B & C). The specific interests which appear to be protected are the constitutional rights of privacy in seeking medical care which may or may not include an abortion (an inalienable right under article I section 1 of the California constitution) and worshipping in the way each citizen sees fit.

Whether or not the particular facility or house of worship performs abortions or not or is the repository of unpopular beliefs is not the concern of the law challenged by the defense. The protection of the right to access is.

It would seem to the court that assuming a patient or worshipper otherwise had access to the Planned Parenthood facility, but then voluntarily asked for information from a person outside the "bubble", subsequent entry into the "bubble" to provide information in all fairness should not be a violation of the law. However, assuming that the defendants responded to persons who voluntarily initiated contact, that does not allow a common law defense to the charges, because the patients of the clinic cannot unilaterally waive the effect of the law.

Those interested parties may contact the defendants outside the bubble zone to receive the information if they wish. This would allow the distribution of materials defendants would wish to give patients and allow those instances of prayer or meditation that either party wished to engage in. Under common law precedents, to repeat it seems clear that defendant may not rely upon the invitation of these patients and later raise this as a defense to the charges such as those before the court.

Notwithstanding the foregoing, the court must determine the effect of these facts in view of the case law construing the operation of the First through the Fourteenth Amendments to the United States Constitution.

Defendant makes two challenges, the first deals with the facial invalidity of the ordinance. The People concede that this area encompassed by the bubble is a traditional public forum, the streets. "The streets are natural and proper

places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey* (1940) 308 U.S. 147, 163.

"The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech." *Frisby v. Schultz* (1988) 487 U.S. 475, 487. *Frisby* dealt with a city ordinance by the city of Brookfield, Illinois which prevented all picketing in private residential neighborhoods.

The court in that case construed the ordinance to deal with a very narrow range of activities (to wit: "only focused picketing taking place solely in front of a particular residence" *Frisby* 487 U.S. at 483). In dealing with a challenge to the facial invalidity of the ordinance, the United States Supreme Court upheld it.

In so doing, the court looked at three criteria, (1) whether or not the ordinance was content neutral, (2) whether or not the ordinance is narrowly tailored to serve a significant government interest and (3) whether it leaves open alternative means of communications. In the Brookfield case the answer the question as to whether or not the ordinance is facially valid was yes.

In reviewing the ordinance at hand, based upon *Frisby*, the court must conclude here that the ordinance is also facially valid.

In many ways, this ordinance has the same basic design as the order by the Superior court reviewed by the Court of Appeal in *Feminist Women's Health Center v. Blythe* (1993)

17 Cal. App. 4th 1543. In *Blythe*, the Court enjoined among other things: "(1) any activity within a "speech free zone" defined as a rectangle extending from the front of the medical building to three feet short of the curb on J Street and 20 feet on either side of the front door . . . (and) (7) interfering with automobiles entering or leaving the parking lot." see *Blythe* at 17 Cal. App. 4th 1554. The Court of Appeal in that case using the same traditional First Amendment analysis found that the order by the court complied with the limitations that traditionally must be adhered to in order for the order to be constitutional.

In the case at bar, the court is struck by the numerous signs and notices to anyone entering and leaving Planned Parenthood, advising interested parties of the message of those interested in counseling or leafletting Planned Parenthood patrons. It is clear to the court that the alternative means of communication are allowed to persons other than Mr. Czekaj who wish to obey this law and counsel patrons. In addition, the face of the ordinance is content neutral. Finally, as the court will develop further on in this memorandum, numerous significant governmental interests are advanced by this ordinance.

Defendant argues that since the ordinance freezes in time forever a code of conduct, that it should be assessed more critically than a court order (which of course binds just the parties at bar) such as those which comprise the body of precedents that constitute the law in this area. This argument has a certain allure and legally, it is fundamentally true. However the premise is in reality false. No society has a greater propensity to solve its fundamental problems by going to court than we do. Pronouncements by courts and the issuances of injunctions in present day society now have

every bit the effect as a legislative pronouncement. All that is needed is the publication of the order in most cases. Notice then is given to all potentially affected parties rather quickly in our times that certain courses of conduct are unlawful or unconstitutional. To say therefore that because an ordinance is a legislative act, it has a lesser effect than say the injunction in *Blythe*, ignores an obvious truth of our times.

Consequently based upon *Frisby* and *Blythe*, the ordinance as this court has had previous occasion to say, is constitutional on its face.

In addition, the court feels constrained to note that Federal constitutional jurisprudence has always accorded great latitude to legislatures in reviewing laws which protect vital interests such as those protected in the Bill of Rights under the Fourteenth Amendment. The United States Supreme Court has on occasion subscribed to a "ratchet theory" when dealing with the protections contained in the bill of rights. The Court has invited legislatures to pass laws which may go further in protecting personal rights than the common law decisions of that Court have (See for example *United States v. Guest* (1966) 383 U.S. 745 in its discussions of legislative enactments under Article 5 of Amendment Fourteen).

Courts sometimes assume that only they are concerned with the constitutional protections of the Bill of Rights and the California Declaration of Rights. But they are not the only keepers of the faith. Many legislators take those constitutional protections seriously and act on those concerns in good faith. Assuming that the City Council is enacting legislation to insure protections to the right of privacy and the right to freely worship as their statement of intent demonstrates (see attachment "A" in Defendant's April 1, 1994 trial Brief), this

ordinance deserves deferential treatment by the courts for its attempt to offer further protection to fundamental rights of freedom of worship and privacy.

In addition, the court feels obliged to note that the Bill of Rights is often discussed in a vacuum. It may be the temper of the times or a unique quality of the American citizen that when the republican forms of government come to consensus and agree to a legislative act, that many people presume that exercise to be unconstitutional, illegal, immoral and/or unworthy of respect and certainly of obedience.

Without belaboring the point, the legislative acts of elected officials are presumed constitutional. Just because a person disagrees with the outcome does not mean he is constitutionally aggrieved, he or she may have a cause of action. He or she may validly claim a violation of his/her rights as a citizen, but they also have obligations to act in accordance with the law when it has been found repeatedly to be valid by courts. If those courts are overruled, then the legal claims of those dissidents are vindicated and the law is nullified. But until that is done, the obligation to obey that law is manifest.

Americans, tend to live in the present. They often times fail to look at their history objectively and appreciate how lucky this country has been in having the rule of law predominate as opposed to the rule of persons. Without getting too far afield, the court noted with some distress the defendant in his brief discussing these cases and equating them with the great slavery issues that ripped this nation apart in the 1860's and was only resolved after the Civil War almost destroyed this country in the course of preserving it.

There are no guarantees our American experiment will succeed. History in fact seems to show that the odds are

clearly against it. It certainly will not succeed if persons repeatedly and continuously treat the pronouncements of their institutions with contempt. And anyone paying attention to today's events understand that if our institutions fail, anarchy and its products will inevitably come to pass.

Additionally, the court notes that on constitutional issues proponents of rights either neglect or negate in their arguments the existence of any other part of the Bill of Rights save that which they are claiming protection under. Defendant's brief is an example of this perspective. In arguing that the ordinance is unconstitutional because of the infringement it makes on their First Amendment freedoms, defendants make the remarkable assertion on page 40 line 9-10 that "there is no general constitutional right to receive health care or to visit a doctor."

First of all, this can't be right. It may be correct that there is no case law that specifically holds that there is a right to visit a doctor or receive health care. But if the right to seek medical treatment is not "implicit to the concept of ordered liberty" or at least guaranteed under the right to pursue life and liberty, this court cannot imagine any rights that would be.

Rather, it appears to this court, that the referred to defense premise is so absurd, that no court of record has ever had or felt the need to reject it. If such a right is not delineated by case law, it is implied within the rights in both the Fifth and Eighth Amendments through the Fourteenth Amendment of the Federal Constitution, and clearly within the California Declaration of Rights.

Additionally, the defense brief seems to give short shrift to the other First Amendment right at issue in M.C. § 9.99.030

and that is the right to freely exercise one's religion. This is a specified right given the same treatment as the right to free speech and press in the same amendment defendant seeks redress under.

The *Frisby* court specifically left open the questions of "Particular . . . applications of the ordinance (that) . . . may present somewhat different questions." *Frisby* at 487 U.S. 488. The court feels that both of the prosecutions of Ms. Hudson and one of the cases of Mr. Czekaj raise the issue of the unconstitutionality of applying this ordinance against these defendants given the facts of their cases.

In Ms. Hudson's two cases, it appears that she was clearly abiding by the legal requirements of M.C. § 9.99.030. However, when a person indicated to her that she wished to receive information Ms. Hudson exercised what she felt was her First Amendment rights to give leaflets to those persons. In Mr. Czekaj's case involving the allegations made against him on January 14, 1994, it appears that the citizen who he contacted once again not only consented to talk to him but actually may have had a mutual moment of prayer with him. To hold that this activity is unlawful would extend an absolute ban on public discourse in an otherwise protected forum.

In this situation, it appears that the persons requesting the leaflets have been allowed the access to the Planned Parenthood Clinic, and since the access has been allowed, the substantial government interest the ordinance was designed to protect has been served. Consequently the enforcement of the ordinance on these cases is violative of the *Frisby* standards. The construction urged by the People that this

is legitimate enforcement of this ordinance cannot therefore withstand constitutional challenge.

The sole issue remaining on the three counts discussed in detail supra, is the order of the court regarding disposition of the three charges. The court finds that except for the prosecution of defendant Czekaj for the alleged violation of 9.99.030 having occurred on January 14, 1994, all of his objections and defenses must be overruled. For the reasons detailed above that charge and the charges against defendant Hudson are dismissed under Penal Code § 1385 as being an unconstitutional application of the ordinance as to the both of them.

On all other charges, the defendant Czekaj is found Guilty as charged. Sentencing will be set for May 6, 1994 in Department I at 10:30. Defense counsel has requested that further proceedings be held on either Friday or Monday and Friday May 6, 1994 is the first Friday the court will be available for sentencing proceedings. As before, if stipulated to, counsel may set the sentencing for whatever day afterward both they and the calendar coordinator agree to.

Dated: April 22, 1994

/s/ Edward De Caro
EDWARD DE CARO
Commissioner of the Courts

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION SIX

2d Crim. No. B090057
[Filed February 7, 1995]

THE PEOPLE,
Plaintiff and Respondent,

v.

RICHARD ANDREW CZEKAJ, et al.,
Defendant and Appellant.

(Santa Barbara County)
(Super. Ct. No. 199477, 200003, 200132, 201578, 202642, 202643)

THE COURT:

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Santa Barbara, having been filed in this court on February 1, 1995, pursuant to an order of certification made by the Appellate

Department, and this court, having considered the matter of whether such cause should be transferred for hearing and decision,

NOW, THEREFOR, IT IS HEREBY ORDERED that such transfer be denied.

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA

Misc 1169
MEMORANDUM

IN RE

PENNIE PHYLLIS HUDSON, et al.,
Petitioners on Habeas Corpus.

The petition for a writ of habeas corpus was tendered to the undersigned at 4:30 P.M. on April 12, 1995. John Q. Masteller of Lowthorp, Richards, McMillan, Miller, Conway & Templeman appeared for petitioners. Janet K. McGinnis, Assistant City Attorney, assisted by Kari L. Zeni, certified law clerk, represented the City of Santa Barbara.

First it appears that only seven of nine petitioners have verified their petitions. Furthermore, the convictions are for infractions calling only for a fine to be paid by May 23, 1995. The city is willing to stay payment of the fines until either 1) the supreme court acts on the petition for writ of certiorari from the judgment of the appellate department of this court affirming the convictions *or* 2) the appeal of

the order granting the preliminary injunction in the case of *Edwards v. City of Santa Barbara*, case no. 94-2243 RG (JRX), is affirmed or reversed, whichever occurs later *and* an additional 45 days has elapsed. Thus, the only reason which might otherwise give standing to petitioners to seek relief by way of habeas corpus is if any of the seven petitioners have been released on their own recognizance. (See *In Re Smiley* (1967) 66 Cal.2d 606.) Thus, unless this court is persuaded that any petitioner is under such constructive restraint, they would not be entitled to have standing to seek habeas corpus.

It is doubtful that any of the petitioners presently have, or will have, standing in light of the proffered stipulation. Therefore, because petitioners have secured interim relief by way of stipulation, the petition is denied without prejudice to renewal.

April 13, 1995

/s/ Patrick L. McMahon
PATRICK L. MCMAHON
Judge of the Superior Court